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SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1952

ALLAN GORDON,
Petitioner,

vs.

UNITED STATES OF AMERICA,

No. .....

ELI TEMPKIN,
Petitioner,

vs.

UNITED STATES OF AMERICA.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN S. BOYDEN,
Counsel for Petitioner.

ALLEN H. TIBBALS,
Of Counsel.

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SUPREME COURT
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ALLAN GORDON,
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UNITED STATES OF AMERICA.
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Allan Gordon and Eli Tempkin respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in these cases February 28, 1953.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254, (1). The Court of Appeals for the Tenth Circuit affirmed the Judgment of Conviction on February 28, 1953, the Honorable Walter A. Huxman, Circuit Judge, dis-

senting. Mandates were issued, but on motion of petitioners were recalled on March 16, 1953, and said mandates were stayed for a period of 30 days from said date, and if within such time a petition for Writ of Ceritorari is filed in the Supreme Court of the United States and a certificate of the clerk of the Supreme Court filed in the Court of Appeals, Tenth Circuit, then, the stay to continue until final disposition of the cases by the Supreme Court. This petition for Writ of Certiorari is filed within thirty days from the entry of judgment herein by the United States Court of Appeals, Tenth Circuit.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Alfred P. Murrah, Sam Gilbert Bratton, Circuit Judges) has not yet been reported and is printed in the record at pages 114 to 123 inclusive. The dissenting opinion (Walter A. Huxman, Circuit Judge) has not been officially reported and is printed in the record at pages 123 to 127 inclusive.

STATEMENT OF THE MATTER INVOLVED

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioners and others of substantive offenses in violation of Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and of conspiring to violate the provisions of said Defense Production Act.

The Information contained four counts: The First Count charged a wilful acceptance of a down payment in an amount less than a sum equal to 25% of the cash purchase price in the sale of a sewing machine; the Second Count charged a wilful failure to keep and preserve bona fide records showing the amount of the purchaser's down payment in an instalment sale of a sewing machine; the

Third Count charged a wilful extension of credit knowing full well that other credit had been extended in connection with the sale, so that the total amount of credit in connection with the sale of a sewing machine was beyond 75% of the cash price of the machine; the Fourth Count charged a conspiracy in violation of Section 371, Title 18 U.S.C. The charge was not a general conspiracy, but merely charged a conspiracy to commit an offense against the United States in violation of the sections and regulation above set out, which offense consisted of the defendants knowingly making an instalment sale of a sewing machine designed for household use to one Evelyn Allen and knowingly extending credit in connection with such sale beyond and in excess of 75% of the cash price of said sewing machine. No overt act was alleged.

The trial court instructed the jury as follows:

> "Now, ladies and gentlemen of the jury, there is a proposition of law which I want to call to your attention, and that is that a person can do acts by himself, he can also do acts through agents or employees; and a person can have knowledge by himself, and he can have knowledge by and through his agents and employees. That is to say, the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer.
>
> "Now that is true, ladies and gentlemen of the jury, only if the agents or employees are engaged in the course of and within the scope of their employment, and only if the knowledge comes to them while they are so engaged, but if they obtain knowledge while they are engaged in the course of the business working for their employer, that kind of knowledge is imputable, — attributable and chargeable to the employer.
>
> * * *
>
> "Now if an agent or employee of Mr. Gordon or Mr. Tempkin, as I have said to you, acting within the course of his employment, makes an installment

sale of a sewing machine, the act of that agent is the act of the master and of the employer." (Tr. 92-93).

Exception was duly taken to this instruction. (Tr. 101)

The Appellate Court held,

> "The effect of this instruction was to hold one partner criminally responsible for the acts of the other and both partners for the acts of their employee salesmen while acting in the course of their employment." (Majority Opinion Tr. 119)

The Court of Appeals further held,

> "What the court did in effect was to make wilfulness an essential element of the offenses charged in the information and to charge the employers with the guilty knowledge and acts of the employees in determining the question of wilfulness." (Majority Opinion Tr. 121)

Affirming the judgment, the Court of Appeals held that in determining the question of wilfulness the petitioners were charged with the knowledge of their employees. (Tr. 121) No distinction in this regard was made by the Appellate Court between the first three substantive offenses charged and the conspiracy count.

If petitioners are not criminally chargeable with the acts of their employees unless they had knowledge of such acts, then there was not sufficient evidence to sustain a conviction of either of the petitioners herein. The majority opinion stated,

> "Since, as we have seen, there is no direct or positive proof that Eli Tempkin made the Colley sale, we have no need to consider whether as a matter of law his partner Gordon would be criminally responsible for his acts, for the conviction of neither of them can stand on that proof. We have then to consider the very perplexing question whether the partners can be held criminally liable for the knowledge and acts of their agents and employees, who, the evidence shows, while acting in the course of their employment, actually made the sales without

having collected the required down payment." (Majority Opinion Tr. 119)

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the conviction of the petitioners by a jury instructed in effect— to use the language of the Court of Appeals — "to charge the employers with the guilty knowledge and acts of the employees in determining the question of wilfulness"? (Majority Opinion Tr. 121)

2. Did the Court of Appeals err when in effect it held that in a conspiracy guilty knowledge of an employee will constitute the employer a co-conspirator when such guilty knowledge was acquired by the employee acting within the scope of his employment?

3. Did the Court of Appeals err in holding, under the statutes and regulations as they existed at the time of the commission of the offenses, that there was sufficient evidence to support the verdict of guilty?

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embody questions of federal law which have not been, but should be, settled by this court.

2. The decision herein is at variance and in conflict with the decisions of the following circuits:

A. The Third Circuit in Nobile vs. United States, 284 Fed. 253, holding that an employer cannot be held criminally liable for the act of his agent merely because it is in the course of his business and within the scope of his agent's employment.

B. The Sixth Circuit in Lurding vs. United States, 179 F. 2d 419, holding that the doctrine of respondeat superior is not to be drawn from the law of negligence and applied to criminal liability.

C. The Seventh Circuit in Paschen vs. United States, 70 F. 2d 491, holding that civilly one is responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes.

D. The Second Circuit in United States vs. Cohn, 128 Fed. 615, holding that it is a rule in criminal cases that a parner is not charged by the criminal acts of his copartners or of others acting in behalf of the firm, unless he has knowledge thereof.

3. The decision herein sustaining conviction of petitioners under instructions charging that the principals are criminally liable for acts committed by their agents within the scope of their employment without the direction or guilty knowledge of the principals departs from the accepted and usual course of judicial proceedings and is a violation of petitioners' rights under the Fifth Amendment of the United States Constitution in that they were deprived of their liberty and property without due process of law.

4. The decision herein appears to be in conflict with applicable decisions of this Court holding that persons having no knowledge of the conspiracy are not conspirators.

WHEREFORE, the petitioners respectfully pray that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Tenth Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the proceedings of that Court herein, being the cases numbered and entitled in its docket as Allan Gordon vs. United States of America, No. 4531, Eli Tempkin vs. United States of America, No. 4532, and that the judgment of that

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Court be reviewed by this Court and for such other and further relief as to this Court may seem proper.

Dated this 23rd day of March, 1953.

ALLAN GORDON

ELI TEMPKIN

Petitioners

JOHN S. BOYDEN
Counsel for Petitioners
Suite 2, 351 So. State Street
Salt Lake City 1, Utah

ALLEN H. TIBBALS
of Counsel

STATUTES INVOLVED

The federal statutes involved are Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and Section 371, Title 18, United States Code. Pertinent portions of these statutes are quoted in the appendix.

STATEMENT OF FACTS

The Information

The Information contained four counts, and charged the petitioners, with others, of criminal offenses against the United States. The First Count charged a wilful acceptance of a down payment in an amount less than a sum equal to 25% of the cash purchase price in a sale of a sewing machine to Buean E. Colley. (Tr. 3)

The Second Count charged a wilful failure to keep and preserve bona fide records showing the amount of the purchaser's down payment in an instalment sale of a sewing machine to Buean E. Colley. (Tr. 3, 4)

The Third Count charged a wilful extension of credit, knowing full well that other credit had been extended in connection with the sale, so that the total amount of credit in connection with a sale of a sewing machine to Evelyn Allen was beyond 75% of the cash price of the machine. (Tr. 4)

The Fourth Count charged a conspiracy in violation of Section 371, Title 18, United States Code. This charge was not a general conspiracy, but merely charged a conspiracy to commit an offense against the United States in violation of the sections and regulation above set out, "which offense consisted of the defendant knowingly making an instalment sale of a sewing machine designed for household use to one

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Evelyn Allen, and knowingly extending credit in connection with such sale beyond and in excess of 75% of the cash price of said sewing machine." (Tr. 4) No overt act was alleged. (Tr. 4)

The Evidence

Counts One and Two are based upon the sale of a sewing machine to Buean E. Colley. (Tr. 3, 4) Both Mr. and Mrs. Colley frequently referred to a Mr. Tempkin as the salesman who made the sale to them. (Tr. 31, 38) There were two Mr. Tempkins in the organization: one the petitioner Eli Tempkin, and the other Irving Tempkin. (Tr. 73) Although Mr. Eli Tempkin was in the courtroom during the entire trial, no attempt at identification was made by either Mr. or Mrs. Colley. The identification of Mr. Tempkin is solely dependent upon a signature appearing on Exhibit "2", shown at page 109 of the transcript. Whether the first letter is a capital "T" or whether it is an "E" traversed by a "T" is difficult to determine. In commenting upon this evidence, the trial court addressed the prosecuting attorney as follows:

> "Mr. Lowry, in the course of the evidence it was your duty to have your witnesses identify these people and you failed to do it in this respect by any positive and direct evidence." (Tr. 91)

The Circuit Court, in commenting upon the same matter, stated,

> "Since, as we have seen, there is no direct or positive proof that Eli Tempkin made the Colley sale, we have no need to consider whether as a matter of law his partner Gordon could be criminally responsible for his acts, for the conviction of neither of them could stand upon that proof." (Tr. 119)

Counts Three and Four are both based upon a sale of a sewing machine to Evelyn Allen. (Tr. 4) Evelyn Allen testified that the salesman who made the sale to her was named Mr. Turner. He was accompanied by another sales-

man whose name she did not know and who was never otherwise identified. (Tr. 42)

Petitioners Allan Gordon and Eli Tenapkin at the times laid in the Information were partners doing business under the name of National Stores. (Tr. 17) Over the objection of counsel for the petitioners that certain evidence was not within the scope of the offenses laid in the Information, testimony from many purchasers not mentioned in the four counts of the Information was taken concerning sales wherein a payment of less than 25% down was made. (Tr. 30, 36, 48, 49, 52, 53, 54, 57, 64, 66, 68)

Petitioner Allan Gordon took the stand and testified that he had never had knowledge of the alleged wrongful acts and introduced the records of the company which showed proper down payments, and copies of the contracts of sale signed by the purchasers showing that the lawful down payments had been made. (Tr. 74, 75, 76)

In addition to the testimony of Mr. Gordon that receipts from the Salt Lake Store were put in the Continental Trust and Savings Bank (Tr. 75), defendants' Exhibits "B" and "C", "D", "E" and "F" showed that the down payments in the correct amounts were deposited in the Continental Bank from the transactions in all four counts of the Information; that is, in the cases of Bucan E. Colley and Evelyn Allen. (Tr. 106)

The testimony of the purchasers was in conflict with the documentary evidence, but since there was no testimony that Mr. Gordon either directed or acquiesced in the falsification of the records, his testimony was entirely reconcilable with the testimony of the purchasers.

The only witness who ever referred to the appellant Gordon was William C. Romney, who stated that Gordon appeared at the place of business as general manager. He stated that he would be there and talk occasionally. He

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stated that they had sales meetings. (Tr. 29) The uncontradicted testimony of Allan Gordon was to the effect that during the year 1951 he came to Salt Lake City two, or not more than three, times. (Tr. 73) Mr. Gordon further testified that by written agreement they required all salesmen to get a deposit with the bookkeeper of 25% of the selling price of the machines. In order to see that this was done, they kept records, bank and interoffice records, book records, everything that goes to make a sale. They had a bank account in the Continental National Bank. (Tr. 74)

ARGUMENT

I.

The Court of Appeals erred in affirming the conviction of the petitioners by a jury instructed in effect — to use the language of the Court of Appeals — "to charge the employers with the guilty knowledge and acts of the employees in determining the question of wilfulness." (Tr. 119 to 122, inc.)

The Circuit Court, in determining that the employers are charged with guilty knowledge and acts of the employees in determining the question of wilfulness, erroneously relied upon the Inland Freight Lines vs. U. S., 10th Circuit case, 191 F. 2d 313, wherein the defendant was a corporation. The position of petitioners is adequately stated in the dissenting opinion of Judge Huxman (Tr. 125) wherein it is conceded that the knowledge of the agents of a corporation is the knowledge of the corporation. That is a well established principle of criminal law as applied in the case of a corporation, but is clearly distinguishable from the case at bar.

> "As a separate entity and aside from its agents and employees a corporation can do nothing. It has no conscience, will, or power of thought. It acts only through its agents. Their acts are the only acts it can commit and their knowledge of necessity is the only knowledge it can have." (Tr. 125).

Judge Huxman is supported by well established authority on this point which he cites in his opinion.[1]

No corporation was involved in the case at bar. In the words of Judge Huxman,

> "The jury was not asked to determine, or was not told, that it was necessary to find that the partners had knowledge or intent that the law was being violated." (Tr. 127)

This decision of the Court is at variance and in conflict with the decisions of other circuits as set forth in No. 2 of our Reasons for Allowance of the Writ.[2]

Petitioners were not only fined $2,500.00 each, but were both sentenced to serve one year in jail with nine months suspended (Tr. 10, 11); this without due process of law. In the words of the dissenting opinion,

> "But while it is important that the guilty be brought to trial and speedily punished, it is even more important to the preservation of our institutions that due process be observed in bringing that about. Due process means that the trial must be conducted according to recognized principles of law and procedure. It requires an impartial trial. It is necessary that only competent evidence be received and that the jury be correctly instructed as to the basic principles of law, guiding it in its deliberations and considerations of the evidence in the case. The partners denied intent to violate the law or any knowledge that their employees were violating it. They were entitled to have their testimony weighed and evaluated under proper instructions by the court together with all other relevant evidence. They were entitled to have the jury told that they were not criminally liable for the acts of their employees, although committed within the scope of their employ-

[1] Burdick Law of Crime, Sec. 175, 178, 179; Bishop New Criminal Law, Sec. 417; Kunz v. Lowden, 124 F. 2d 911; Haverty Furniture Co. v. Foust, 124 S.W. (2d) 695.

[2] Nobile vs. U. S., 3rd Circuit, 284 Fed. 253; Lurding vs. U. S., 6th Circuit, 179 F. 2d 419; Paschen vs. U.S., 7th Circuit, 70 F. 2d 491; U.S. vs. Cohn, 2nd Circuit, 128 Fed. 615.

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ment, unless they directed such activities or had guilty knowledge thereof." (Tr. 124)

The instruction of the lower court departed from the accepted and usual course of judicial proceedings so as to constitute a violation of petitioners' rights under the Fifth Amendment of the Constitution of the United States of America, depriving them of their liberty and property without due process of law.

II.

The Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute an employer a co-conspirator when such guilty knowledge was acquired by the employee acting in the scope of his employment. (Majority Opinion Tr. 121).

The trial court made no distinction between the first three substantive offenses charged in the Information and the conspiracy charged in the Information, when it stated that the agent or employees of the petitioners acting within the course of their employment, the act of the agent is the act of the master and of the employer (Tr. 93). Neither did the Circuit Court, in affirming the decision, make such a distinction when approving the instruction that the employers are charged with the guilty knowledge and acts of the employees in determining the question of wilfulness (Tr. 121). The agents were employed to sell sewing machines, a legitimate business operation. The jurors were instructed that the petitioners were chargeable with the acts of their agents in the selling of sewing machines. The court ignored the principle that a conspirator must have knowledge of the conspiracy. The effect of the decision in this regard appears to be in conflict with the applicable decisions of this Court holding that persons having no knowledge of the conspiracy are not conspirators. United States of America, Petitioner, vs. Salvator Falcone, 311 U.S. 205, 85 L. Ed. 128. This Court in commenting upon the

Falcone decision in a later case, Direct Sales Co., Petitioner, vs. United States of America, 319 U.S. 703, 87 L. Ed. 1674; at p. 711 U.S.; and P. 1681 L. Ed. stated that,

> ". . . without the knowledge the intent cannot exist. Furthermore to establish the intent the evidence of knowledge must be clear not equivocal, this, because charges of conspiracy are not to be made out by piling inferences upon inferences, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

III.

The Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offense, that there was sufficient evidence to support the verdict of guilty.

The Defense Production Act of 1950 includes "wilful violation" as an element of the offense (Appendix 15). Each count of the Information charged wilfulness on the part of the defendants. (Tr. 3, 4) The action of both the trial court and Circuit Court as hereinbefore described, has therefore, interpreted the Defense Production Act as an act wherein the guilty knowledge of the employees may be charged to the employers in determining the question of wilfulness. We do not believe that such was the intent Congress. Since both the trial court and the Circuit Court assume the petitioners were responsible for the criminal acts of their employees, and that such acts charged guilty knowledge to the employers in determining the question of wilfulness under the statute, the petitioners have never had the sufficiency of the evidence to support the verdict of guilty against them correctly determined in the light of existing law.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

JOHN S. BOYDEN,
Counsel for Petitioners

ALLEN H. TIBBALS
of Counsel

APPENDIX

TITLE VI — CONTROL OF CONSUMER AND REAL ESTATE CREDIT

Tit. 50, App. U.S.C. 2131

"§ *2131. Power to exercise consumer credit controls*

"To assist in carrying out the objectives of this Act [sections 2061-2166 of this Appendix], the Board of Governors of the Federal Reserve System is authorized, notwithstanding the provisions of Public Law 386, Eighteenth Congress (61 Stat. 921), to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary, but in no event beyond the date on which this section terminates. * * *" Sept. 8, 1950, c. 932, Title VI, Sec. 601, 64 Stat. 812; July 31, 1951, 7:00 P.M. E. D. T., c. 275, Title I, Sec. 106 (a), 65 Stat. 138

Tit. 50, App. U.S.C. 2133

"§ *2133. Penalties*

"Any person who willfully violates any provision of section 601, 602, or 605 [sections 2131, 2132, or 2135 of this Appendix] or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both. Sept. 8, 1950, c. 932, Title VI, § 603, 64 Stat. 814; July 31, 1951, 7:00 p.m., E. D. T., c. 275, Title I, § 106(b), 65 Stat. 138."

PART 222 — CONSUMER CREDIT REGULATION W

Sept. 8, 1950, 15 F. R. 6118

"§ *222.2 General requirements and registration —(a) General requirements.* Each person engaged in the business of making instalment sales or instalment loans, or engaged in the business of lending on the security of or discounting or purchasing obligations arising out of such credit, is referred to in this part as a 'Registrant'; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him or out of any such obligation lent on or discounted or purchased by him, except on the following conditions:

"(1) He must have a license, and each Registrant is hereby granted such a license, but such license of a Registrant may be suspended in the manner and on the grounds stated in § 222.8(b); and

"(2) The credit extended, renewed, revised or consolidated by him, or giving rise to the obligation discounted or purchased by him or acquired by him as collateral must comply with the applicable requirements of this part.

* * *

"§ *222.3 Instalment sales; general rules.* * * *

"(*a*) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (*c*) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

* * *

"(*c*) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article; except that in the case of an article listed in Group D of § 222.9, the down

payment shall be obtained at or before the time of beginning the agreed-upon repairs, alterations, or improvements.

* * *

"§ *222.6 Certain technical provisions*—* * *

"(*c*) *Record of instalment sale.* The record of an instalment credit arising from the sale of a listed article and required by § 222.3(b) shall set forth (in any order) the following information:

"(1) A brief description identifying the article purchased;

"(2) The cash price of the article;

"(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating the monetary value assigned thereto in good faith;

"(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

"(5) The time balance owed by the purchaser, which is the sum of items (2) and (4) minus item (3); and

"(6) The terms of payment.

The record need not include a description of the article if it is purchased by means of a coupon book or similar medium of instalment credit upon which there has been made a cash down payment of at least as great as the highest down payment required by this part on any article sold by the Registrant. The record need not include the information called for by items (2) and (4) if the Registrant is one who, with respect to the article, customarily quotes to the public a time price only which includes the finance or other charges if any, provided he sets forth such time price in such record, and provided he obtains a cash down payment which is at least as large as would be required if the percentage specified for

the article in § 222.9 were applicable to the time price. * * *

"§ *222.9 Supplement.*

"*Part 1. Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used, are 'listed articles,' and the following required down payments and maximum loan values are prescribed (such down payments and loan values to be calculated as specified in Parts 4 and 5 of this section; but such down payment and loan value requirements shall not apply in the case of a listed article having a cash price of less than $50, exclusive of any applicable sales tax:

* * *

"*Group B-25 percent minimum down payment, 75 percent maximum loan value:*

* * *

"9. Sewing machines designed for household use."

CHAPTER 19 — CONSPIRACY

Tit. 18, U.S.C. 371

"§ *371. Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

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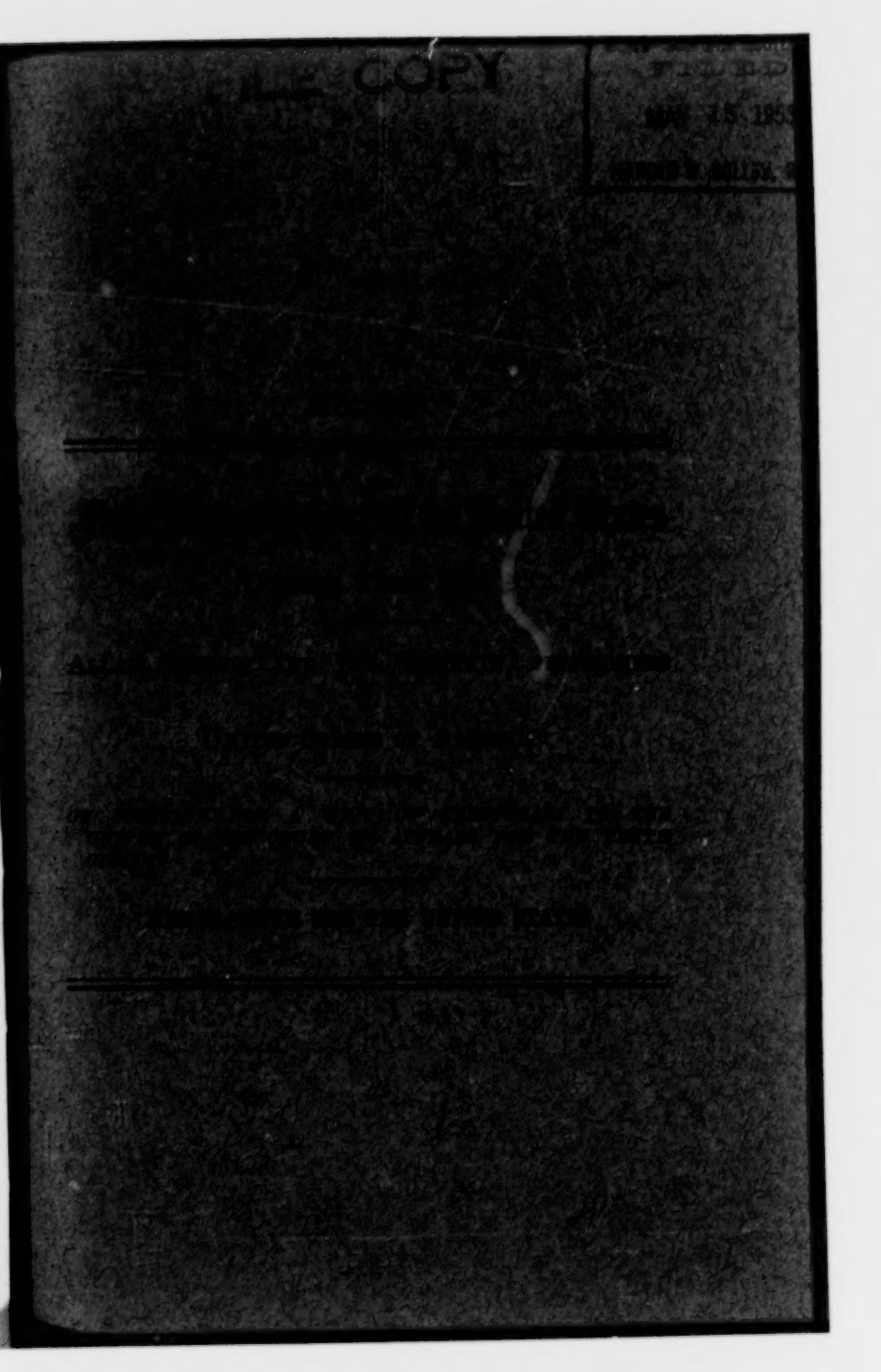
(Footnote to § 371)

"Historical and Revision Notes"

"*Reviser's Note.* Based on Title 18, U.S.C., 1940 ed., §§ 88, 294 (Mar. 4, 1909, c. 321, §37, 35 Stat. 1096 [derived from R.S. § 5440]; Mar. 4, 1909, c. 321, § 178a, as added Sept. 27, 1944; c. 425, 58 Stat. 752).

"This section consolidates said sections 88 and 294 of Title 18 U.S.C., 1940 ed. • • •"



In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 688

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 114–123) and dissenting opinions (R. 123–127) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 28, 1953 (R. 127–128). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether in a prosecution for wilful violations of consumer credit regulations in the installment

sales of sewing machines, the court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner owners of the business.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 10 *et seq.*

STATEMENT

Petitioners Gordon and Tempkin, together with Deverich, Stone, and Turner, were charged in the United States District Court for the District of Utah with violations of Sections 601 and 603 of the Defense Production Act of 1950 (64 Stat. 798, 812, 814) and Regulation W (51 F. Reg. 6118 as amended 15 F. Reg. 6931) promulgated thereunder (pp. 10–12, *infra*). The first count in the information charged that the two petitioners and Deverich and Stone, on March 21, 1951, made an instalment sale of a sewing machine to Buean E. Colley, and that on the delivery of this machine they unlawfully, knowingly, and wilfully accepted and received a down payment of less than 25 percent of the sale price (R. 3). The second count charged the same persons with unlawfully, knowingly, and wilfully failing to keep records showing the amount of the purchaser's down payment in the instalment sale of the machine to Buean E. Colley (R. 3–4). The third count charged that the two petitioners and Deverich, Stone, and Turner, on May 17, 1951, made an instalment sale of

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a sewing machine to Evelyn Allen and extended credit knowing that other credit had been extended therewith, so that the total amount of credit in connection with the sale exceeded 75 percent of the sale price (R. 4). The fourth count charged that the persons mentioned in count three conspired to violate Sections 601 and 603 of the Act and Regulation W by making the sale of the machine to Evelyn Allen as alleged in count three (R. 4–5).

The jury found all the defendants guilty as charged (R. 8). Petitioners were given concurrent sentences of imprisonment for one year and a $2,500 fine on each of the four counts, with nine months of the jail sentence suspended, and the fines suspended on all but one of the four counts (R. 10–11). On appeal (R. 13–14) their convictions were affirmed by a divided court (R. 127–128).[1]

The evidence may be summarized briefly as follows:

Petitioners Gordon and Tempkin were engaged in the business of selling new and used sewing machines as a partnership under the name of National Stores, first in Los Angeles and later in Salt Lake City, Utah, where the sales laid in the information were made (R. 17, 32, 79–80).

[1] The court below reversed the convictions of Deverich and Stone on the ground of insufficient evidence (R. 117–118, 123). Turner was given a suspended sentence, placed on probation, and did not appeal (R. 9).

An intensive newspaper and radio advertising campaign for low priced re-built sewing machines to be purchased on time stimulated sales. In most instances new and more expensive machines instead of the re-built models were sold, thereby increasing the salesmen's commissions. One salesman testified that he made about 50 sales, in about 80 percent of which he took "I. O. U.'s" for down payments; that these were turned into the company office and treated as cash as far as the company was concerned; and that he was paid the full amount of his commissions irrespective of the down payments. He testified that the management told the salesmen to procure the required 25 percent down payment, but to accept an "I. O. U." for it if they could not get it otherwise. (R. 29–30, 86, 87.)

Regarding the Colley sale forming the basis for counts one and two, one Tempkin made the sale at the company store. Colley paid $1.00 to hold the machine until his next payday when he brought in an additional $15.00 before taking the machine away. A Mr. Tempkin, in the presence of Mrs. Colley, signed on the date of the sale the conditional sale contract, showing the price as $152.95 with a stated down payment of $38.95, but the signature on the contract was obliterated. The receipt for the original $1.00 bore a signature "E. Tempkin." Colley later made additional payments of $4.00 and $3.00 on the down pay-

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ment to a female employee at the store, $23.00 being the total amount paid on the stated down payment of $38.95 (R. 31–38, 72, 103–104, 109). There were two Tempkins connected with the organization, the petitioner Eli and an Irving Tempkin (R. 73). The Government's evidence did not identify which of the Tempkins made this sale.

In the Allen sale forming the basis of counts three and four, the salesman Turner made the sale after bringing the machine to the purchaser's house. The conditional sale contract showed the price of $152.95 including tax, with a down payment of $38.95. The purchaser paid only $13.00 of this stated down payment, signed three "I. O. U.'s" for $6.50 each, and on subsequent dates mailed in envelopes addressed to the company, with the salesman's name on the inside, three money orders for $6.50 each. The obligation for the balance of the down payment was to the salesman alone. (R. 41–45, 70, 104.)

There was also evidence as to numerous other instalment sales of sewing machines to persons other than those named in the information, where less than the required 25 percent down payment was made at the time of the purchases (R. 46, 51, 52, 54–55, 56, 57, 64–65, 66, 68–69, 104, 105, 106).

Petitioner Gordon was the general manager, and gave talks at sales meetings at the Salt Lake City store. He resided in Los Angeles and vis-

ited the Salt Lake City store two or three times during 1951. (R. 29, 73.) Gordon identified company records showing proper down payments by purchasers, and the deposits of these in a Salt Lake City bank (R. 74–76, 106–107). Gordon denied instructing any company employees that they could waive the down payment required by Regulation W, and testified that he had no knowledge of any transactions where less than the down payment was required, until the time of a hearing before the Federal Reserve Board about such discrepancies (R. 78–79, 82). Gordon admitted that at the end of that hearing he stated: "Everything that isn't right has been discontinued" (R. 85).

DISCUSSION

All three judges in the court below agreed that, in the words of the dissenting judge, the "evidence is sufficient to sustain a conclusion that the partners had reason to know that the regulations were being violated by their employees" (R. 123–124). The basis of the dissent below and petitioners' principal contention in this Court is that the case was not submitted to the jury under proper instructions. This argument stems from the judge's charge that "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer," if the knowledge of the agent was obtained while engaged in the business of the employer in the scope of his employment (R. 92–

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93).[2] In the words of the majority below, "[w]hat the court did in effect was to make wilfulness an essential element of the offenses charged in the information, and to charge the employers [petitioners] with the guilty knowledge and acts of the employees in determining the question of wilfulness" (R. 121).

This is admittedly the standard applied in determining the criminal liability of corporations, even where, as here "wilfulness" is an element of the offense. *C. I. T. Corp.* v. *United States*, 150 F. 2d 85, 89–90 (C. A. 9). It has not hitherto been applied to noncorporate owners where intent is an element of the crime.

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[2] Petitioners' other contentions are merely restatements of the same basic contention. They argue that, under the charge, a conviction for conspiracy was possible without proof that they had knowledge of the conspiracy (Pet. 13–14.) However, the court, after describing the offense of conspiracy (R. 95–96), stated:

"* * * that is a question * * * which the court submits to you for your determination under count 4, whether or not, as the court has defined the word 'conspire' to you, from all the facts and circumstances in this case you find that there was an agreement, or an understanding, or a scheme to violate the law of the United States; * * *"

Nevertheless, since the general instruction as to imputing knowledge preceded the discussion of the specific counts, it is possible that the jury could have thought that, under the instructions, the same general rule applied to all counts. We therefore agree that the case must stand or fall on the validity of this general instruction.

Similarly petitioners' attack on the sufficiency of the evidence (Pet. 14) is merely upon the use of the standard set forth in the charge as quoted above.

A corporation can act only through agents, and a corporation as such cannot go to jail. Insofar as individual liability is concerned, it is a general principle of criminal law that guilt is personal. Hence the rule laid down by the decided cases is that a master or employer is not criminally responsible for the acts of his agent or employee which he did not authorize, counsel, advise, approve, or ratify. *Lurding* v. *United States*, 179 F. 2d 419, 421 (C. A. 6); *Paschen* v. *United States*, 70 F. 2d 491, 503 (C. A. 7); *Nobile* v. *United States*, 284 Fed. 253 (C. A. 3); *United States* v. *Cohn*, 128 Fed. 615 (S. D. N. Y.); Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689.

There is a well-recognized exception to this rule for certain types of welfare legislation as to which intent is not an element of the offense. *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *Behrman*, 258 U. S. 280. Consumers' credit controls, such as are involved in the instant case, might well have fallen in this category if Congress had not limited the penal provision, which imposed sentences up to imprisonment for one year, to persons who "wilfully" violate. This requirement of wilfulness seems plainly to manifest a congressional intention that individual violators of the statute should not be punished in the absence of criminal intent. There is no doubt that "wilfully" as used in this type of statute means no more than that the act constituting the

violation must be knowingly and intentionally performed. *Cf. Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder* v. *United States,* 312 U. S. 335, 341. But while the word implies no evil motive, it does imply a *mens rea* which is essentially personal and individual. We therefore believe that it was error for the court below to affirm the conviction of petitioners on a charge which did not require that they have the intention to violate the law as described above.

CONCLUSION

There was ample evidence of petitioners' guilt. Since the charge to the jury was, in the opinion of both petitioners and respondent, improper for the reasons stated, the case may appropriately be disposed of summarily. The petition for certiorari should be granted and, if the Court agrees with these views, the judgment of the Court of Appeals vacated and the case remanded to the District Court for retrial.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MAY 1953.

APPENDIX

Statutes and Regulations Involved

The Defense Production Act of 1950, 64 Stat. 798, 812, 814, provides:

> Sec. 601. To assist in carrying out the objectives of this Act, the Board of Governors of the Federal Reserve is authorized * * * to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary * * *.
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> * * * * *
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> Sec. 603. Any person who willfully violates any provision of section 601 or 602 or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Part 222—Consumer Regulation W, September 8, 1950, 15 F. Reg. 6118, as amended October 16, 1950, 15 F. Reg. 6931, provides:

> § 222.2 *General requirements and registration—*
>
> (a) *General requirements.* Each person engaged in the business of making instalment sales * * * is referred to in this part as a "Registrant"; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him * * * except on the following conditions:

(1) He must have a license, and each Registrant is hereby granted such a license * * *.

(2) The credit extended * * * must comply with the applicable requirements of this part.

* * * * *

§ 222.3 *Instalment sales; general rules* * * *

(a) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (e) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

(b) *Amounts and intervals of instalments; record.* * * * The information specified in § 222.6 (e) shall be set forth in a bona fide record of any transaction subject to this section.

(c) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article * * *.

§ 222.6 *Certain technical provisions.* * * *

* * * * *

(e) *Record of instalment sale.* The record of an instalment credit arising from the sale of a listed article and required by § 222.3 (b) shall set forth (in any order) the following information:

(1) A brief description identifying the article purchased;

(2) The cash price of the article;

(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating

the monetary value assigned thereto in good faith;

(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

(5) The time balance owed by the purchaser, which is the sum of items (2) and (4) minus item (3); and

(6) The terms of payment.

* * * * *

(i) *Side loan to make down payment.* A Registrant shall not extend any credit for financing the purchase of any listed article if he knows or has reason to know that there is, or that there is to be, any other credit of any kind extended in connection with the purchase of the listed article which would bring the total amount of credit extended in connection with such purchase beyond the amount of instalment credit permitted by this part; but, if the Registrant accepts in good faith a written statement signed by the obligor that no such other credit exists or is to be extended, such statement shall be deemed to be correct for the purposes of the Registrant.

§ 222.9 *Supplement.*

Part 1. *Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used are "listed articles", and the following required down payments and maximum loan values are prescribed * * *

Group B—25 percent minimum down payment, 75 percent maximum loan value:

* * * * *

9. Sewing machines designed for household use.

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JUNE 1, 1953.

Per Curiam Decision.

No. 688. GORDON ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in the light of the Government's confession of error. *John S. Boyden* and *Allen H. Tibbals* for petitioners. *Acting Solicitor General Stern* for the United States. Reported below: 203 F. 2d 248.